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No. 90-1044

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

SEWELL PLASTICS, INC.,

Petitioner,

v.

THE COCA-COLA COMPANY, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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January 29, 1991

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COUNTERSTATEMENT OF QUESTIONS PRESENTED FOR REVIEW

Where several Coca-Cola bottlers form a cooperative to manufacture plastic soft drink bottles for themselves at a lower cost and, as a direct result, competition in the market increases substantially:

1. Does the formation of the cooperative violate the antitrust laws?

2. Do contractual provisions reasonably necessary for the formation and operation of the cooperative violate the antitrust laws?

3. Do injuries attributable to the increased competition in the market represent compensable "antitrust injury" to a competing seller?

STATEMENT PURSUANT TO RULE 29.1

Respondent The Coca-Cola Company has an ownership interest, excluding one hundred percent ownership, in each of the following domestic and Canadian companies: The Coca-Cola Bottling Company of New York, Inc.; Brucephil, Inc.; Coca-Cola Bottling Company Consolidated; Coca-Cola Enterprises, Inc.; Johnston Coca-Cola Bottling Group, Inc.; T.C.C. Beverages Ltd; Sunbelt Coca-Cola Bottling Company, Inc.; Rutgers Minority Investment Company; MESBIC Financial Corporation of Dallas; Albev Trading, Inc.; and China Ventures, L.P.

Respondent Alabama Coca-Cola Bottling Co. is a wholly owned subsidiary of Coca-Cola Enterprises, Inc. Respondent The Atlanta Coca-Cola Bottling Co. is a division of Coca-Cola Enterprises, Inc. Coca-Cola Enterprises, Inc. has an ownership interest, excluding one hundred percent ownership, in The Mid-Atlantic Coca-Cola Bottling Co., Inc. and The Coca-Cola Bottling Co. of the Mid South.

Respondents Biscoe Coca-Cola Bottling Co., Inc., Coca-Cola Bottling Co. of Mobile, Coca-Cola Bottling Co. of Nashville, Inc., Coca-Cola Bottling Co. of Roanoke, Inc., Columbus Coca-Cola Bottling Co., and Tarboro Coca-Cola Bottling Co., Inc. are wholly owned subsidiaries of respondent Coca-Cola Bottling Co. Consolidated. In addition, respondent Lincolnton Coca-Cola Bottling Co., Inc. has been merged into Coca-Cola Bottling Co. Consolidated.

Respondent Coca-Cola Bottling Co. of Asheville, N.C., is a division of Coca-Cola Bottling Co. Affiliated, Inc. which is a subsidiary of Sunbelt Coca-Cola Bottling Co. Respondents Coca-Cola Bottling Co. of Anderson, South Carolina and Mid South Coca-Cola Bottling Co. have been merged into Coca-Cola Bottling Co. Affiliated, Inc. Respondent Charleston Coca-Cola Bottling Co. has changed its name to Palmetto Bottling Co. and is also a subsidiary of Sunbelt Coca-Cola Bottling Co. Respondents Columbia Coca-Cola Bottling Co., Dorchester Coca-Cola Bottling Co., and Hamp-

ton Bottling Works, Inc. have been merged into Palmetto Bottling Co. Respondent Fayetteville Coca-Cola Bottling Co. is a subsidiary of Sunbelt Coca-Cola Bottling Co. Respondent Coca-Cola Bottling Co. of Wilson, Inc. is a subsidiary of Fayetteville Coca-Cola Bottling Co. An Australian corporation, C.C. Bottlers Ltd., through its wholly owned subsidiary, Diverse Products Ltd., owns approximately 27% of Sunbelt Coca-Cola Bottling Co.

There are no parent or subsidiary corporations to be listed for the following respondents: Southeastern Container, Inc.; Aberdeen Coca-Cola Bottling Co., Inc.; Carolina Coca-Cola Bottling Co., Inc.; Coca-Cola Bottling Co. United, Inc.; Coca-Cola Bottling Works of Tullahoma, Inc.; Durham Coca-Cola Bottling Co., Inc.; Eastern Coca-Cola Bottling Co., Inc.; Orangeburg Coca-Cola Bottling Co., Inc.; Plymouth Coca-Cola Bottling Co., Inc.; Rock Hill Coca-Cola Bottling Co.; Roddy Manufacturing Co.; Coca-Cola Bottling Co. of Johnson City, Tennessee; Sanford Coca-Cola Bottling Co.; and The Coastal Coca-Cola Bottling Co., Inc.

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RESPONDENTS' BRIEF IN OPPOSITION

Petitioner Sewell Plastics is the nation's largest manufacturer of plastic soft drink bottles. Its complaint in this case alleged that 34 Southeast area Coca-Cola bottlers violated the antitrust laws by forming a cooperative—Southeastern Container—to make plastic bottles for themselves. Southeastern was established in 1982 by a group of small to mid-sized Coca-Cola bottlers who wanted to reduce their packaging costs. As a result of Southeastern's formation, competition in the plastic bottle market has increased dramatically. As Sewell concedes, *all* purchasers are now paying much lower bottle prices, total output in the market has increased sharply, market concentration has declined, and consumers

are paying much lower prices for soft drinks in plastic bottles.

In a detailed opinion, the district court granted summary judgment and dismissed the complaint. The court of appeals unanimously affirmed on the opinion below. The lower courts' decision was correct, does not conflict with any decision of this Court or any court of appeals, and presents no question of importance warranting further review. Certiorari should be denied.

STATEMENT OF THE CASE

Counterstatement of Facts

Acknowledging that it seeks "*de novo* scrutiny of the evidence" in this Court (Pet. 10), Sewell's Petition presents a version of the facts which the courts below specifically rejected, even while construing the evidence as favorably as possible to Sewell. (Pet. App. 29a.) A Counterstatement of Facts is therefore necessary, particularly in light of several significant misstatements of the record in the Petition.

1. ***Events prior to Southeastern's formation.*** From 1977 to 1982, Sewell was the "dominant" manufacturer of plastic soft drink bottles in the Southeast, with an overall market share exceeding 50% and a share of the Coca-Cola bottler business of more than 90%. (Pet. App. 31a-33a.) During this period, prices increased significantly, from $243 per thousand (24.3¢ per bottle) in 1977-78 to a list price of $320 per thousand (32¢ per bottle) in 1981 (with discounts for some bottlers). (*Id.* 33a.) By 1980-81, the Bottler Defendants, a group of mostly small and medium-sized bottlers, were typically paying in excess of $300 per thousand (30¢ per bottle). (*Id.*; Record 1054-55, 2231-32, 2610, 2776, 5348.)

Not all bottlers were paying these high prices. A number of bottler groups operating "canning cooperatives" (jointly-owned facilities for filling soft drink cans) formed cooperative ventures to manufacture their own bottles. The first of

these "self-manufacturers" was Carolina Packaging, formed by a group of Southeast area Pepsi bottlers in late 1978. Carolina Packaging's founders were also members of Carolina Canners, a Pepsi "canning cooperative." Two early Coca-Cola self-manufacturers similarly had canning co-op origins: Western Container in Texas and Gulf States in Mississippi. (Pet. App. 35a.)

Plastic bottle-making cooperatives evolved out of canning cooperatives for a simple reason. A considerable amount of plastic bottle volume is required to reach minimum efficient scale, and few bottlers have sufficient volume on their own. Canning cooperatives were formed to allow bottlers to aggregate sufficient volume to justify the construction of high-speed canning lines. (Record 1854-55.) With most of the volume justifying consideration of plastic bottle self-manufacture already aggregated for canning purposes, it was logical for the canning co-ops to consider taking this next step. And several did.

2. ***Formation of Southeastern.*** The leaders in the formation of Southeastern were the members of a South Carolina Coca-Cola canning co-op known as South Atlantic Canners (SAC). In 1980-81, while these bottlers were paying prices of about 30¢ per two-liter bottle, they were reading in trade journals that their Pepsi competitors in Carolina Canners were making their own two-liter bottles for only 20¢ to 25¢ apiece. This gross disparity—5¢ to 10¢ per bottle—was a serious concern. (*Id.* 5250-52, 5286, 5379.)

The SAC bottlers decided to pursue the options available "to reduce packaging costs and better compete with Carolina Canners." (*Id.* 5296; Pet. App. 35a.) They initially considered entering into a joint venture with Sewell, but Sewell refused. It offered instead only a small reduction in price. (Record 5315-16, 5322; Pet. App. 48a.) After pursuing various other possibilities, the SAC bottlers decided to establish a self-manufacturing facility. To direct the effort, they hired John Dunagan, the founder and president of Western Container.

In early 1982, Dunagan developed a proposal for SAC. It was based on securing the bottlers' commitments for an annual volume of 48 million bottles. Sewell recognized that SAC needed substantial volume commitments to support an efficient plant. To sabotage the project, therefore, Sewell developed an "In-House PET Strategy" designed "to break up the in-house group through pricing concessions to key members." (Record 5337.) The plan was to capture the business of the larger potential members "at pricing levels which make the investment of self-manufacture unattractive, and prohibit South Atlantic Canners from obtaining the necessary volume to support machinery." (*Id.* 5331, 5342; Pet. App. 39a.) Several bottlers—including the three largest Coca-Cola bottlers in the area—accepted Sewell's offers. But just enough of the others remained, and a decision was made to proceed.

3. ***Southeastern's supply contracts.*** The evidence is uncontroverted that Southeastern developed its supply contracts to obtain commitments of sufficient volume to justify the expensive investment required in new plant and equipment. (*E.g.*, Record 1856-57, 2759-60.)[1] The supply contracts were patterned after the Western Container and Gulf States contracts, which provided that the new ventures would account for 80% of the member-bottlers' requirements. Southeastern's supply agreement had a five-year term, as did the Gulf States agreement; Western's agreement had a ten-year term. (Record 1082-83.) After expiration of the initial five-year period, Southeastern's agreement could be terminated at any time on 60 days notice. (Pet. App. 36a-37a.)

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1 There were two other significant reasons for Southeastern's contracts. First, The Continental Group, owner of the patented technology for making the one-piece plastic bottles Southeastern's members decided to use, insisted on supply contracts covering the "major portion of [the bottlers'] requirements" for "more than four years" as a condition for licensing its technology. (Record 5339.) Second, Southeastern's bankers believed the contracts were "important" to "make sure [Southeastern] would be a feasible, practical lending opportunity." (*Id.* 3441-47.)

Obtaining volume commitments by using supply contracts was standard industry practice. Sewell's standard form contract (which it presented to Southeastern's principal founders, among others, when the co-op was being formed) lasted five years and covered 100% of the bottler's requirements. (Record 5271-83.) The other suppliers in the market regularly used long-term requirements contracts as well. (Pet. App. 37a.) Sewell's original proposal to the bottlers who formed Western Container was for a ten-year, 100% requirements contract. Southeastern's members received a 12-year, 90% proposal from another supplier. (Record 5214-16, 5305.)[2]

4. ***Southeastern's growth.*** From its start in 1982, Southeastern's philosophy was to reduce costs by operating on a streamlined basis using state-of-the-art technology. The strategy succeeded and the company soon became recognized as *the* most efficient producer in the country. Southeastern's prices plummeted to a point where they were typically 20 to 30 percent lower than those of outside suppliers, saving Southeastern's members millions of dollars each year. (*Id.* 2475, 5393, 6639.)

Although Southeastern's initial share of Sewell's "relevant market" (a gerrymandered area limited to the territories of Southeastern's membership) was only 11.9%, the significant disparity between Southeastern's prices and those of other suppliers led many new members—including several larger bottlers—to join. By 1986, Southeastern's members included what Sewell calls "virtually every Coca-Cola bottler within its market," and its market share reached 33.5%. (Pet. App. 45a-46a.)

5. ***Effect of Southeastern on competition.*** On every possible measure of competitive performance, market conditions have improved due to the increased competition Southeastern

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2 Sewell implies—incorrectly—that the Pepsi cooperative, Carolina Packaging, did not use supply contracts. (Pet. 6 n.3.) In fact, like Southeastern, it initially used supply contracts and, like Southeastern, it charged each of its members the same delivered price. (Record 5350, 5463.) Unlike Southeastern, Carolina Packaging solicited business from non-members.

has generated. The evidence covers the period through the end of 1986, the cut-off date for discovery.

Price. Plastic bottle prices declined drastically. Southeastern's average net two-liter price dropped from $215 per thousand (21.5¢ per bottle) in 1982, to $191 in 1983, $164 in 1984, $147 in 1985, and $136 (13.6¢ per bottle) in 1986. Southeastern added three-liter and 16-ounce sizes in 1985, and the pricing followed the same trend. (Record 6628-32, 6639.)

The lower prices offered by Southeastern and other cooperatives forced Sewell and other suppliers to reduce costs and lower prices to prevent other bottlers from joining or forming cooperatives of their own. As a result, prices fell not just to co-op members, but *across the entire market.* Sewell's average two-liter prices dropped from $220 per thousand in 1982 to $173 in 1986. The prices of all other suppliers declined significantly as well. (Record 5449-51, 5466, 6639.)

Output. Plastic bottle output in the relevant market increased sharply from 1981 to 1986. Production rose from 128.6 million equivalent cases to 305.2 million cases, an increase of 137%. The increase in the Southeast was significantly greater than in the rest of the country. (Pet. App. 42a; Record 6655.)

Market concentration. The relevant market became substantially less concentrated following Southeastern's formation. From 1981 to 1986, the aggregate market share of the top four firms declined from 93.7% to 86.2%. The Herfindahl-Hirshman Index (HHI) dropped from 3321 to 2359. (Pet. App. 43a.)

Retail prices to consumers. Retail soft drink prices plummeted from 1982 to 1986. In the Southeast area as measured by A.C. Nielsen Co. (a slightly larger area than Sewell's "relevant market"), average prices for soft drinks sold in two-liter and three-liter plastic bottles declined 7.3%, from $3.53 per equivalent case to $3.27. In contrast, during the period from 1978 to 1980-81, when plastic bottle prices were increas-

ing, prices for soft drinks in plastic bottles increased as well. It was not until bottle prices started declining that the price to the consumer began to fall. In the period following Southeastern's formation, prices for soft drinks in plastic bottles declined, but prices for soft drinks in *other* packages *increased* 15.5%. In addition, prices for soft drinks in plastic bottles were significantly lower in the Southeast than in the rest of the country. (Record 6710; Pet. App. 43a-44a.)

Sewell's admissions of intense competition. The statistical evidence of increased competition is confirmed by repeated admissions in Sewell's formal Annual Reports and 10-K reports. For example, the Annual Report for 1982, the year Southeastern was formed, admitted increased price discounting and "the advent of competition resulting from the threat of self-manufacture." (Record 4893.) The 1983, 1984, and 1985 Annual Reports similarly referred to intense and "accelerated" price competition. (*Id.* 4902, 4906, 4912, 4930-31.) In 1986 and 1987, the company's 10-K reports admitted that "the plastic container industry is highly competitive," that there is "heavy price discounting" of plastic soft drink containers, and that "this price competition is expected to continue and may become even more intensive." (*Id.* 4980, 4991.)

Sewell argued below that these SEC filings did not specifically refer to Southeastern. But its Strategic Plan made it quite clear who Sewell was talking about:

> *Coca-Cola's Southeastern Co-operative in Asheville, NC, has set the standard for the new, low pricing.* The concept of this cooperative was to acquire the latest state-of-the-art equipment . . . . There are nine other co-operatives or in-house operations. None has had the market price impact of this particular operation.

(Record 6106 (preliminary version; emphasis added).) Southeastern's role was confirmed by numerous other Sewell documents and the testimony of its senior officers.[3]

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3 Despite increasing sales and substantial profits, Sewell was unhappy with the competition it faced from co-ops generally and from Southeastern in

Proceedings Below

Following exhaustive discovery and extensive procedural wrangling (*see* Pet. App. 17a-29a), the district court granted defendants' motion for summary judgment and entered final judgment for the defendants under Fed. R. Civ. P. 54(b) (Pet. App. 77a). The court dismissed the per se price-fixing boycott claims for at least two separate reasons: (1) the challenged restraints were ancillary to the formation and operation of the Southeastern joint venture (*id.* 90a, 92a-93a), and (2) the Bottler Defendants were not substantial competitors of one another (*id.* 87a-89a, 92a). There were also two separate reasons for the dismissal of Sewell's rule of reason claims: (1) Sewell failed to present legally sufficient evidence of any adverse effect on competition (*id.* 56a-58a), and (2) on the undisputed evidence, the challenged arrangements "were reasonably necessary to achieve *pro*competitive benefits which clearly outweigh any anticompetitive effect" (*id.* 58a-60a, 67a). Finally, as a separate and alternative ground for dismissing all of Sewell's claims, the court held that Sewell failed to prove "antitrust injury" under this Court's decision in *Brunswick Corp. v. Pueblo Bowl-O-Mat*, 429 U.S. 477 (1977), and its progeny. (Pet. App. 64a-66a.)

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particular. In June 1986, Sewell approached The Coca-Cola Company and threatened suit unless Coca-Cola agreed either to "stop the growth of the co-ops" or to enter into three-year requirements contracts for plastic bottles at excessive prices for Coca-Cola's wholly owned bottling subsidiaries. Coca-Cola refused. (Record 3253-71.) Sewell then filed this lawsuit, challenging Southeastern's very existence. Sewell's chief executive testified that the lawsuit seeks to have Southeastern dissolved or sold to Sewell. (*Id.* 3158-59.) After filing the suit, Sewell pursued a strategy of seeking to settle with Bottler Defendants who would commit all their volume exclusively to Sewell. Only one bottler, Wilmington Coca-Cola, agreed. In August 1987, Sewell proposed to resolve the lawsuit by *acquiring* Southeastern and entering into seven-year, 100% exclusive dealing arrangements with each of the Bottler Defendants (at prices significantly higher than Southeastern's). The defendants rejected the offer emphatically. (*Id.* 1923-25.) If allowed, the acquisition would have increased Sewell's share of its "relevant market" to 73%. (*Id.* 6673-74.)

The Court of Appeals for the Fourth Circuit affirmed unanimously "on the opinion of the district court" (Pet. App. 8a) in a per curiam, not-for-publication order. (*Id.* 1a-8a.) Sewell's petition for rehearing and suggestion for rehearing en banc were denied without dissent. (*Id.* 10a.)

REASONS FOR DENYING THE WRIT

This case raises no issue warranting Supreme Court review. Contrary to the argument in the Petition, this case does not present any broad question concerning the antitrust analysis of buyer agreements. The conduct at issue here is the creation of a new joint *production* venture. Nothing in the lower courts' opinions suggests any new or different standard for evaluating buyer conduct under the antitrust laws. The district court and court of appeals based their rulings on the simple insufficiency of Sewell's evidence and the well-established principle that conduct that increases competition in the marketplace, yielding lower prices to consumers, does not violate the antitrust laws. The opinions below were carefully based on the governing precedents and raise no conflict with any decision of this Court. The Petition does not even allege a conflict in the circuits.

Further review is especially inappropriate given the fact-bound nature of the decision below and Sewell's request that this Court engage in "*de novo* scrutiny of the evidence" contained in the massive record. (Pet. 10.) The evidence was carefully considered by the courts below and further review of their factual determinations is unwarranted. Certiorari should be denied.

I. THE COURTS BELOW HELD CORRECTLY THAT SEWELL FAILED TO PRESENT SUFFICIENT EVIDENCE OF A VIOLATION OF THE ANTITRUST LAWS OR ANTITRUST INJURY

Despite the characterizations in Sewell's Petition, this is not a case involving a naked agreement among competing buyers to purchase from the same supplier at the same price. At issue in this case is the creation of a joint production venture by a group of noncompetitors and the consequent addition of a new competitor to the marketplace. Nothing in the decision below suggests that concerted buyer arrangements are exempt from traditional antitrust scrutiny. The courts below upheld the challenged arrangement on well-established principles of general application.

To avoid summary judgment, Sewell had to present sufficient evidence of either a "per se" violation of the antitrust laws or an unreasonable restraint of competition under the "rule of reason." *E.g., Northwest Wholesale Stationers v. Pacific Stationery & Printing Co.*, 472 U.S. 284, 293-98 (1985); *Jefferson Parish Hospital v. Hyde*, 466 U.S. 2, 29 (1984). Sewell also had to demonstrate "antitrust injury." *E.g., Brunswick Corp. v. Pueblo Bowl-O-Mat*, 429 U.S. 477 (1977). The courts below properly held that Sewell's evidence was insufficient in each of these respects.

A. No Per Se Violation

1. Sewell's per se argument is simple. The Bottler Defendants have agreed to purchase 80% of their plastic bottles in certain sizes from Southeastern; therefore, to that extent, they are "boycotting" other suppliers. Furthermore, Southeastern, which is owned by the bottlers, sets prices for the bottles it sells; therefore, the bottlers are also guilty of "price fixing."

As this Court has consistently recognized, however, simple labelling of a practice as a "boycott" or "price fixing" does

not establish a per se violation. In the price fixing context, the Court has said:

> [T]his is not a question simply of determining whether two or more potential competitors have literally "fixed" a "price." As generally used in the antitrust field, "price fixing" is a shorthand way of describing certain categories of business behavior to which the *per se* rule has been held applicable. . . . Literalness is overly simplistic and often overbroad. When two partners set the price of their goods or services they are literally "price fixing," but they are not *per se* in violation of the Sherman Act. Thus, it is necessary to characterize the challenged conduct as falling within or without that category of behavior to which we apply the label "*per se* price fixing."

Broadcast Music, Inc. v. CBS, 441 U.S. 1, 8-9 (1979). The same is true in the boycott context as well. *E.g., FTC v. Indiana Federation of Dentists*, 476 U.S. 447, 458-59 (1986); *Northwest Wholesale Stationers*, 472 U.S. at 293-94.

The test to determine if a boycott is a "per se boycott" or if literal price setting is "per se price fixing" is whether "*the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output.*" *NCAA v. Board of Regents*, 468 U.S. 85, 100 (1984) (emphasis added); *Broadcast Music*, 441 U.S. at 19-20. The scope of per se condemnation is narrow. *Business Electronics v. Sharp Electronics*, 485 U.S. 717, 723 (1988); *Indiana Dentists*, 476 U.S. at 458-59. It is reserved only for "naked" restraints, i.e., restraints that are "manifestly anticompetitive," *Business Electronics*, 485 U.S. at 723; *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 58 (1977), and "have no purpose other than restricting output and raising prices," *Rothery Storage & Van Co. v. Atlas Van Lines*, 792 F.2d 210, 229 (D.C. Cir. 1986) (Bork, J.), *cert. denied*, 479 U.S. 1033 (1987).[4]

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4 A focus on the tendency to restrict output is valid whether the conduct is by sellers or buyers. Selling-side market power is exercised when

2. As the courts below properly determined, neither the 80% requirements feature of Southeastern's supply contracts nor the fact that Southeastern sets a price for the products it sells can be characterized as a "naked" restraint subject to the per se rule. Each is instead "part of an integration of the economic activities of the [defendants] and [is] capable of enhancing the group's efficiency . . . ." *Rothery*, 792 F.2d at 229. In other words, each is "ancillary" to the joint venture, and must therefore be evaluated under the rule of reason. *Id.*; *see Business Electronics*, 485 U.S. at 729 & n.3; *United States v. Addyston Pipe & Steel*, 85 F. 271, 280-83 (6th Cir. 1898) (Taft, J.), *aff'd*, 175 U.S. 211 (1899).

"A restraint is ancillary when it may contribute to the success of a cooperative venture that promises greater productivity and output." *Polk Bros. v. Forest City Enterprises*, 776 F.2d 185, 189 (7th Cir. 1985) (Easterbrook, J.); *see Rothery*, 792 F.2d at 224, 229-30. Southeastern's supply agreements meet the test. The contracts provide Southeastern with reasonable assurance of volume, enabling it to obtain the equipment needed to commence and expand production of two-liter, three-liter, and 16-ounce plastic bottles.

The same analysis applies to the "price fixing" claim. The per se rule against price-fixing applies only where there "is an agreement to fix the price to be charged in transactions with third parties, not between the contracting parties themselves." *Sitkin Smelting & Ref. Co. v. FMC Corp.*, 575 F.2d 440, 446 (3d Cir.), *cert. denied*, 439 U.S. 866 (1978). The courts below were correct in holding that it is not price-fixing

sellers restrict market output (sales) to increase prices above the competitive level. Buying-side market power is exercised when buyers restrict market output (purchases) to depress prices below the competitive level. *See* 4 P. Areeda & D. Turner, *Antitrust Law* ¶ 964 (1980); R. Posner & F. Easterbrook, *Antitrust* 148-50 (2d ed. 1981).

when companies are "setting a price charged *to them* by a source of supply owned *by them*." (Pet. App. 92a.)[5]

3. A "horizontal" agreement is not "always or almost always" likely to restrict competition and decrease output unless it is among firms that truly compete with each other. *See, e.g., Royal Drug Co. v. Group Life & Health Ins. Co.*, 737 F.2d 1433, 1436-37 (5th Cir. 1984), *cert. denied*, 469 U.S. 1160 (1985); *Lomar Wholesale Grocery v. Dieter's Gourmet Foods*, 824 F.2d 582, 590-95 (8th Cir. 1987), *cert. denied*, 484 U.S. 1010 (1988); *Mackey v. NFL*, 543 F.2d 606, 619 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 801 (1977). In this case, therefore, per se treatment is inappropriate; the Bottler Defendants operate in exclusive territories and are "not essentially competitors." (Record 773.)[6]

The per se rule is applicable only in contexts where *marketwide* output restriction is likely. *Business Electronics*, 485 U.S. at 726-27; *see also id.* at 726 (*inter*brand—not *intra*brand—competition is "the primary concern of the antitrust laws"). If the Bottler Defendants collectively decide to restrict their joint output, they can affect only the output of *their own brand*. And any output reduction here would be senseless. A restriction in bottle purchases by the Bottler Defendants would damage their ability to meet downstream demand, and they would lose sales to Pepsi and other brands. Thus, as noncompetitors, the Bottler Defendants lack both the power and the incentive to restrict output

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5 Contrary to Sewell's argument (Pet. 21-22), there is no requirement that a covenant be "necessary to 'market the product at all' " to be considered ancillary. This Court has specifically rejected such a "least restrictive alternative" test and held that the appropriate standard is whether the covenant is "*reasonably* necessary." *Broadcast Music*, 441 U.S. at 19 (emphasis added); *Sylvania*, 433 U.S. at 58 n.29; *see also Rothery*, 792 F.2d at 227-28.

6 Nothing in *FTC v. Superior Court Trial Lawyers Ass'n*, 110 S. Ct. 768 (1990), suggests a different result. Contrary to the argument in the Petition (Pet. 20), the defendants there were direct competitors, as this Court emphasized. 110 S. Ct. at 774-75.

marketwide. Restriction of market output is therefore unlikely, and the per se rule does not apply.

4. In *Northwest Wholesale Stationers,* this Court held that joint purchasing cooperatives are not illegal per se:

> Wholesale purchasing cooperatives such as [the defendant] are not a form of concerted activity characteristically likely to result in predominantly anticompetitive effects. Rather, such cooperative arrangements would seem to be "designed to increase economic efficiency and render markets more, rather than less, competitive." *Broadcast Music, Inc. v. CBS*, 441 U.S. 1, 20 (1979). The arrangement permits the participating retailers to achieve economies of scale in both the purchase and warehousing of wholesale supplies, and also ensures ready access to a stock of goods that might otherwise be unavailable on short notice. The cost savings and order-filling guarantees enable smaller retailers to reduce prices and maintain their retail stock so as to compete more effectively with larger retailers.

472 U.S. at 295. *Northwest* involved a joint *purchasing* cooperative formed by *competing* stationers. The Court's rationale applies with even greater force here, where the challenged conduct is the creation of a joint *production* venture (involving significantly greater potential for creating efficiencies) by a group of *noncompetitors.*

B. No Violation Under the Rule of Reason

Under the rule of reason, Sewell's burden was to demonstrate that defendants' conduct (1) had a substantial adverse effect on competition in the relevant market, and (2) was not reasonably justified by a need to achieve legitimate, procompetitive objectives. *E.g., Jefferson Parish Hospital v. Hyde,* 466 U.S. 2, 29-32 (1984); *Clamp-All Corp. v. Cast Iron Soil Pipe Institute,* 851 F.2d 478, 486 (1st Cir. 1988), *cert. denied,* 488 U.S. 1007 (1989). As the lower courts correctly ruled, Sewell failed in both respects.

1. *No adverse effect.* Sewell had the burden to show that defendants' conduct had the actual or probable effect of increasing prices, restricting output, or otherwise restraining competition substantially. Effects on price and output are the primary factors in determining whether competition has been restrained. *NCAA v. Board of Regents*, 468 U.S. 85, 107-08 (1984) ("[r]estrictions on price and output are the paradigmatic examples of restraints of trade"); *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 500-01 (1940) ("in general restraints upon competition have been condemned only when their purpose or effect was to raise or fix the market price"); *Standard Oil Co. v. United States*, 221 U.S. 1, 58 (1911). Analysis of market concentration and market power is also important because market power and increased market concentration may yield adverse price and output effects. *See, e.g., Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 768 (1984). The ultimate question is whether the plaintiff has demonstrated actual or probable *consumer* harm. *See, e.g., NCAA*, 468 U.S. at 107 ("Congress designed the Sherman Act as a 'consumer welfare prescription.' "). "The Sherman Act's very purpose is to help consumers, in part by bringing about low, nonpredatory prices." *Monahan's Marine v. Boston Whaler, Inc.*, 866 F.2d 525, 527 (1st Cir. 1989) (Breyer, J.).

Sewell failed to present any evidence of harm to consumers or to the competitive process in any respect. On the contrary, the uncontroverted evidence demonstrated that defendants' conduct *increased* competition substantially. (*See* pp. 5-7 above.) None of the arguments Sewell raises in this Court provides a basis for concluding otherwise.[7]

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7 The lower courts' factual inquiry into the competitive impact of the challenged arrangements was made more straightforward by the fact that, at the time of the district court's judgment, the arrangements had been in effect for almost seven years. Virtually all of Southeastern's five-year contracts, in fact, had expired. Accordingly, the courts below were able to assess the *actual* effects of the challenged arrangements with reasonable assurance that the probable *future* effects would give rise to no competitive concerns. Even so, both courts examined the actual *and* potential effects of defendants' conduct in detail.

a. *Lower prices.* Sewell's principal contention is that "lower prices represent anticompetitive effects in joint buyer cases." (Pet. 23.) This argument was properly rejected by the courts below as an improper effort to obtain protection from legitimate price competition. *See Atlantic Richfield Co. v. USA Petroleum Co.*, 110 S. Ct. 1884, 1891 (1990).

"Low prices benefit consumers regardless of how those prices are set, and so long as they are above predatory levels, they do not threaten competition." *Id.* at 1892. Lower prices are harmful to consumers, and therefore anticompetitive, only if the lower prices are predatory (i.e., below competitive levels) or otherwise set so low that market output is reduced. *E.g., id.* at 1891-92; 4 P. Areeda & D. Turner, *Antitrust Law* ¶ 964 (1980). In this case, there was no such evidence. On the contrary, market output increased and there was no below-cost or subcompetitive pricing by Southeastern or any other supplier. (Pet. App. 40a-41a, 56a-58a.)

In the joint purchasing context, lower prices generally enhance competition by reducing the buyers' input costs and enabling them to lower prices to consumers. *Northwest*, 472 U.S. at 295. The procompetitive effects of lower prices are even more apparent where, as in this case, the context is the creation of a joint production venture as a new competitor in the marketplace. Lower prices here represent the process of competition in action. To allow a plaintiff to challenge as "*anti*competitive" the lower prices attributable to increased competition generated by a new entrant would be to subvert the purposes of the antitrust laws.

b. *Market power.* Sewell did not just fail to produce any evidence of actual harm to competition. *See Indiana Dentists*, 476 U.S. at 460-61. It also failed to demonstrate market power. That failure was fatal to its case under the rule of reason. As the courts below correctly recognized, "[w]ithout evidence of market power, there is no basis for finding 'undue' foreclosure of the relevant market." (Pet. App. 58a.) *Accord, e.g., Ryko Mfg. Co. v. Eden Services*, 823 F.2d 1215, 1233-35 (8th Cir. 1987), *cert. denied*, 484 U.S. 1026

(1988); *see Ball Memorial Hospital v. Mutual Hospital Ins.*, 784 F.2d 1325, 1334 (7th Cir. 1984) (Easterbrook, J.) ("[m]arket power is a necessary ingredient in every case under the Rule of Reason").

"Market power is the ability to raise prices above those that would be charged in a competitive market" or, similarly, to depress prices below competitive levels. *NCAA*, 468 U.S. at 109 n.38. As the courts below noted, however, Sewell did not even allege that Southeastern could sell its bottles at prices beyond competitive levels. (Pet. App. 45a-49a.) Instead, Sewell relied exclusively on percentage statistics.[8]

Power over price cannot be determined on the basis of market share percentages alone. *E.g., Ball Memorial,* 784 F.2d at 1335-36. Even a market share of 100% may not indicate market power if other facts are shown. *See Metro Mobile CTS v. NewVector Communications*, 892 F.2d 62 (9th Cir. 1989). This Court has declined to find market power in cases involving market shares similar to the 32% at issue here. *Jefferson Parish*, 466 U.S. at 26-27 & n.43 (30%); *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594, 611-13 (1953) (40%); *see also Cargill, Inc. v. Monfort of Colorado*, 479 U.S. 104, 119-20 n.15 (1986) (28.4%).

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8 Sewell claims that the relevant percentage share here is 40%, the collective soft drink market share of Southeastern's members. (*E.g.*, Pet. *i*, 10.) Southeastern's contracts cover only 80% of this volume, however, and the pertinent share for foreclosure analysis is therefore at most 32%. There was no evidence of any "implied" agreement to purchase 100% rather than 80%. During the 1982-1986 period, 19.7% of the bottle purchases of Southeastern's members were from other suppliers, predominantly Sewell. (Pet. App. 86a; Record 6685.) A figure of 32% "foreclosure" is itself an exaggeration. Because of staggered expiration dates, Southeastern's contracts covered 32% of the market for only about 18 months (Spring 1986 to Fall 1987), after which the figure declined. Moreover, the contracts were never rigorously enforced. The record reveals over 20 instances where the 80% "requirement" was not fulfilled, all without any threatened "penalty" or "financial assessment" by Southeastern. (Record 6686-87.) Sewell misstates the record in arguing that one bottler, Anderson, was precluded from accepting a lower price offered by Sewell. (Pet. 8-9, 26 n.12.) In fact, the Anderson bottler accepted Sewell's offer; Anderson started buying again from Southeastern only after Southeastern's price decreased. (Record 2939-40, 3846.)

In this case, the undisputed facts indicate that Southeastern's market share is unlikely to exceed 40% (since Southeastern sells only to Coca-Cola bottlers), and that a 40% (or even 50%) share in this market confers no power to raise prices above (or decrease prices below) competitive levels. (Pet. App. 45a-49a.)

Sewell's response is to say that Southeastern has the "*right* to set the price which each of the 33 bottlers must pay . . . ." (Pet. 24.) Obviously every company has the "right" to determine the prices it will charge. That right is not *market power*, however, unless there is proof of the ability to increase prices above (or depress prices below) *competitive levels*—proof that Sewell could not and did not present.

c. *Harm to competitors.* Sewell also argues that competitors were harmed. Since the antitrust laws are for the protection of competition, not competitors, Sewell's allegations are insufficient as a matter of law. *Atlantic Richfield*, 110 S. Ct. at 1891; *Copperweld*, 467 U.S. at 767.

In this case, moreover, there was no evidence of any significant competitor harm. It was undisputed that the aggregate sales of Southeastern's competitors in the Southeast area increased every year, and that Sewell's own production expanded from 65.2 million cases in 1981 to 88.2 million in 1986. (Record 1687.) Significantly, there was no evidence that *any* competitor was ever unprofitable. Sewell itself was (and is) extremely profitable. (Pet. App. 49a-50a.) In *Atlantic Richfield*, in contrast, numerous competitors were driven out of business. *See* 110 S. Ct. at 1896-97 n.5 (Stevens, J., dissenting). Nevertheless, this Court held that injury to *competition* had not been shown. *Id.* at 1892-93.

Sewell suggests that, in this case, competitor harm is a matter of public importance warranting a grant of certiorari. It argues that if Southeastern's operation is not declared illegal, then in some areas Coke and Pepsi bottlers might both form cooperatives; independent bottle-makers would not have sufficient remaining business to continue operating, the argument goes, and "bottlers of lesser known brands would have

nowhere to turn for bottles." (Pet. 16-17.) Sewell advanced no such argument in the courts below, and for good reason: there is no evidence to support it.

In the entire United States, the only market in which both Coke and Pepsi bottlers have formed cooperatives is the market at issue here, the Southeast area. This market has supported four other independent suppliers, each of which had significantly greater sales in 1986 than in 1981, before Southeastern was formed. (Record 6620.) Nor was there any harm to bottlers of "lesser known" brands. Sales of non-Coke, non-Pepsi soft drink brands in plastic bottles increased at a rate 71% greater in the Southeast than in the rest of the country. (*Id.* 6619.)

Southeastern's formation may have made its competitors less comfortable. Added competition always does. In the more intensely competitive environment, Southeastern's competitors could no longer sit back and leave well enough alone. They were forced to cut costs and become more efficient. But when they did, they were rewarded with increased profits. Consumers were rewarded as well.

d. *Quality and research & development.* Finally, Sewell argues that there have been adverse effects on quality and on research and development. Both arguments suffer from the same flaw: a failure to show any adverse effects in "the market as a whole." *Jefferson Parish*, 466 U.S. at 31. Sewell's evidence established nothing more than that a few suppliers curtailed "R&D" expenditures and that Southeastern experienced an occasional quality problem.[9] In the market as a

9 The Petition misrepresents the record in connection with the quality issue, claiming that one Southeastern bottler was experiencing a bottle explosion problem with Southeastern's bottles and, yet, was denied "permission" to purchase from Sewell. (Pet. 9.) The evidence is uncontroverted that the bottler in fact started buying from Sewell immediately. The problem, moreover, had nothing to do with the quality of Southeastern's bottles; it related to factors at the bottler's filling facility which impaired the performance of the one-piece bottle Southeastern used. (Record 2218, 2845-48, 3377-78.) Overall, Southeastern's quality was (and is) excellent. (*Id.* 2899-900, 5399.)

whole, however, technological improvements accelerated and quality competition increased. (Pet. App. 44a-45a.) The lower courts were entirely correct in concluding that Sewell's evidence of harm to competition was legally insufficient.

2. *Procompetitive justifications.* The courts below properly held, as an alternative ground for summary judgment under the rule of reason, that Southeastern's supply contracts were reasonably justified as a matter of law. (*Id.* 58a-59a.)

This Court has repeatedly recognized that multi-year supply contracts used to induce investment in the establishment or expansion of production facilities are reasonable and justified. *See, e.g., United States v. General Dynamics Corp.*, 415 U.S. 486, 499-500 (1974); *United States v. El Paso Natural Gas Co.*, 376 U.S. 651, 660 (1964); *Standard Oil Co. v. United States*, 337 U.S. 293, 306-07 (1949). In this case, Sewell's own chief executive admitted that long-term supply contracts are "prudent" in light of the need for volume and the substantial investment involved. (Record 3162-63, 3199-201.) There was no contrary evidence.

C. No Antitrust Injury

As a separate, alternative ground for summary judgment on all of Sewell's claims, the courts below held that Sewell had failed to show "antitrust injury" under *Brunswick Corp. v. Pueblo Bowl-O-Mat*, 429 U.S. 477 (1977) and *Cargill, Inc. v. Monfort of Colorado*, 479 U.S. 104 (1986). (Pet. App. 63a-66a.) The essence of the antitrust injury requirement is that a plaintiff must demonstrate an injury that "reflects the *anticompetitive effect*" of the challenged conduct. *Brunswick*, 429 U.S. at 489 (emphasis added). If the injury is attributable to continued or increased competition, the plaintiff's case must be dismissed. *Cargill*, 479 U.S. at 115-17.

Brunswick holds squarely that a plaintiff may not claim damages resulting from the presence of an additional competitor in the market. 429 U.S. at 486-89. Yet that is exactly what Sewell did. Despite Sewell's present denials that it is complaining about Southeastern's presence in the market,

Sewell's damages theory below was in fact based *entirely* on the additional profits Sewell said it would have made if Southeastern *had never been formed*; Sewell presented no evidence of any other source of injury or damage. (Record 2594-604.) Under Sewell's damages theory, prices for bottles would have been much higher than they were in the real world, the market would have been far more concentrated, and Sewell would have had a near monopoly. (*Id.* 2594-604, 3768-882, 6666.) Sewell's damages theory, in short, was premised on *lessened* competition. As in *Brunswick*, it would be "inimical to the purposes of [the antitrust] laws" for this kind of claim to stand. 429 U.S. at 488. The ruling that Sewell failed to demonstrate "antitrust injury" was correct, is sufficient by itself to sustain the judgment, and does not warrant further review.

II. FURTHER REVIEW OF THE LOWER COURTS' FACTUAL DETERMINATIONS IS UNWARRANTED

Sewell's Petition expressly asks the Court to engage in a "*de novo*" review of the evidence. (Pet. 10, 26-27.) In this case, that would entail consideration of a massive record which, as "condensed" in the court of appeals by the deferred appendix method, produced a 20-volume joint appendix containing 6973 pages.

The factual review sought by Sewell is inappropriate. Certiorari is not granted "to review evidence and discuss specific facts." *United States v. Johnston*, 268 U.S. 220, 227 (1925). This principle is especially appropriate here, where the district court meticulously examined the evidence in a 71-page opinion and a unanimous court of appeals affirmed per curiam on the opinion below. *See* R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice* 217-18 (6th ed. 1986).

Sewell argues that it was inappropriate for the district court to assess the legal sufficiency of Sewell's evidence—even though all the evidence on which the court relied was stipulated, admitted, or uncontroverted, and "viewed in the

light most favorable to plaintiff." (Pet. App. 29a.) As Sewell would have it, summary judgment is *never* permissible in a rule of reason case; "reasonableness," rather, should *always* be for a jury to decide. (Pet. 26-27.) Fortunately, Sewell's view is not the law. *See, e.g., NCAA*, 468 U.S. at 109-10 n.39; *Barry v. Blue Cross*, 805 F.2d 866, 871 (9th Cir. 1986). Under the applicable precedents, a district court *must* assess the legal sufficiency of a plaintiff's evidence when a properly supported motion for summary judgment has been made. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Anderson v. Liberty Lobby*, 477 U.S. 242, 247-52, 256-57 (1986); *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 585-88 (1986).

The district court and court of appeals engaged in a proper analysis of the evidence, applied the appropriate rules of law, and reached the correct result. Nothing in their opinions merits further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

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